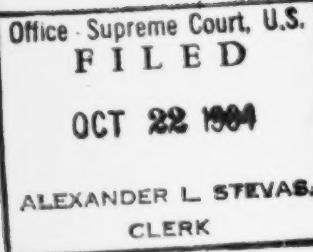


84-666



No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1984

THE ATTORNEY GENERAL OF THE TERRITORY OF
GUAM ON BEHALF OF ALL UNITED STATES
CITIZENS RESIDING IN GUAM QUALIFIED
TO VOTE PURSUANT TO THE ORGANIC
ACT, ROLAND FAIRFIELD, CESAR
ALEGRIA, GERTRUDE BALAJADIA,
BERNADITA S.N. ALVAREZ, Petitioners

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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BEN



QUESTIONS PRESENTED

1. Whether United States citizens who reside in the Territory of Guam and vote in the territorial elections, who formerly were residents and voters in the several states of the Union, have the same privileges and immunities and equal protection of the law under the United States Constitution as United States citizens who reside in foreign nations and vote for the President of the United States pursuant to the Overseas Citizens Voting Rights Act.
2. Whether the United States Congress has the authority pursuant to the Constitution of the United States to legislate qualifications for citizens of states voting in the election for the President of the United States, superseding the authority of the several states to qualify their own electors for the Presidential election.
3. Whether United States citizens have a right to vote in the election for President and Vice-President of the United States independent of their place of residence.

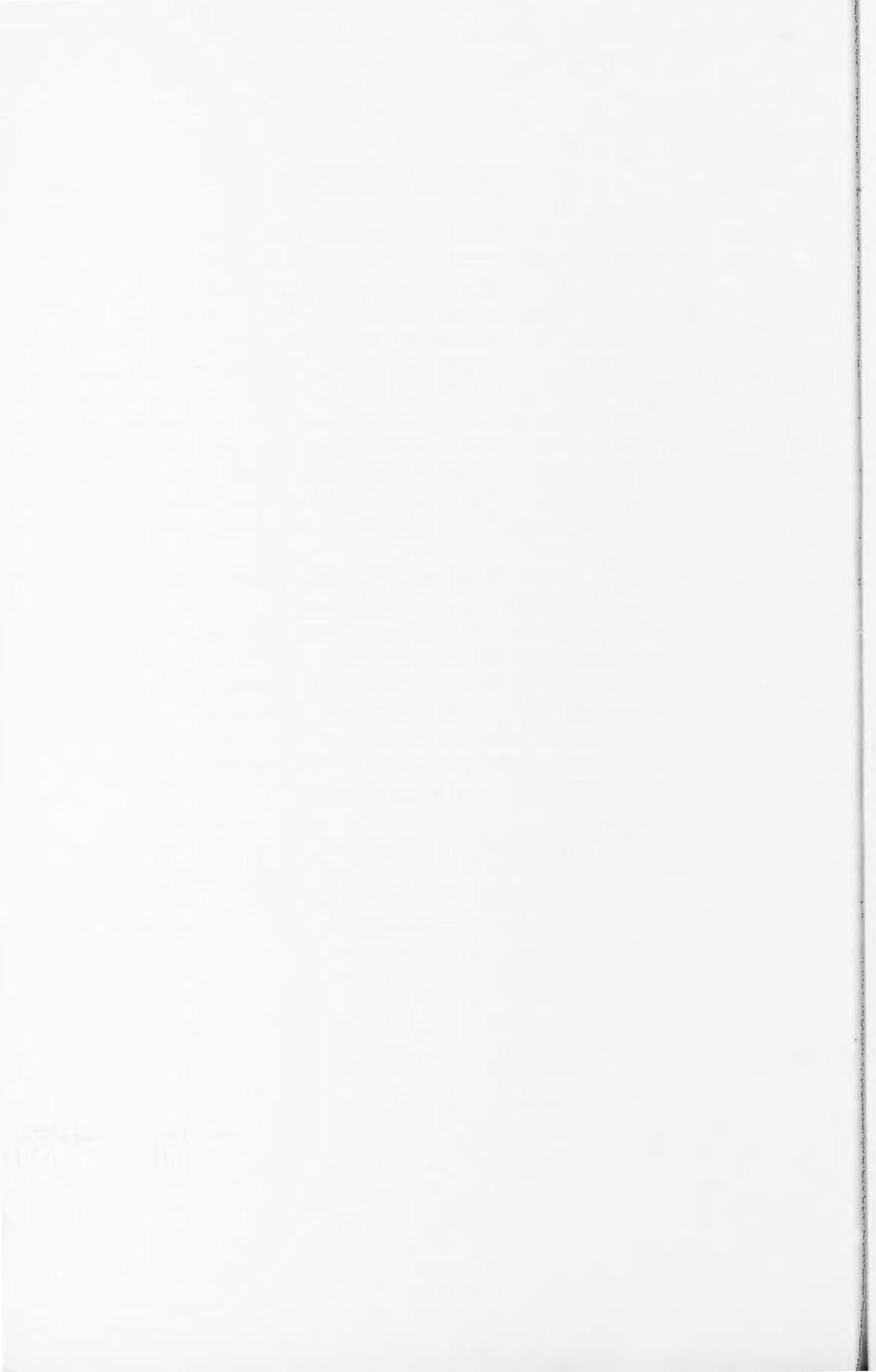


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v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners, United States citizens who
are residents and voters in the Territory of
Guam, respectfully pray this Court issue a
Writ of Certiorari to review the judgment of
the United States Court of Appeals for the
Ninth Circuit, entered in cause number
83-1890 on July 24, 1984, which affirmed the

judgment of the District Court of Guam.

OPINION BELOW

The opinion of the Ninth Circuit issued on July 24, 1984 affirmed the holding of the District Court of Guam. The judgment of the District Court of Guam which ordered dismissal of plaintiffs' complaint was entered on March 16, 1983. On March 16, 1983, the District Court of Guam rendered an opinion with its order of dismissal. A notice of appeal was filed on April 13, 1983 from the order of dismissal of the District Court of Guam.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1) and Rule 17(1)(c) of the Rules of this Court, to review a decision of the U.S Court of Appeals for the Ninth Circuit regarding the right of United States citizens residing in the Territory of Guam, to vote for President

and Vice-President of the United States, which right has been identified as a fundamental right under the Constitution of the United States by decisions of the Supreme Court of the United States.

The judgment of the Ninth Circuit was entered on July 24, 1984. This petition is timely in that it is filed prior to the expiration of the ninety day period prescribed by 28 U.S.C. section 2101(c).

STATUTES

Article II, section 1, clause 2 of the United States Constitution provides:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Article IV, section 3 of the United States Constitution provides:

Section 3. New States may be

admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any Claims of the United States, or of any particular State.

The Organic Act of Guam, 48 U.S.C. § 1421b(u) provides:

(u) The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that Territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence 1 of the fourteenth amendment; and the fifteenth and nineteen amendments.

All laws enacted by Congress with respect to Guam and all laws enacted by the territorial legislature of Guam which are inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency.

42 U.S.C.A. § 1973aa-1 states the following:

Residence requirements for voting

Congressional findings

(a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections ---

(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

(3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution;

(4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;

(5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and

(6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential

elections.

Congressional declaration: durational residency requirement, abolishment; absentee registration and balloting standards, establishment

(b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

Prohibition of denial of right to vote because of durational residency requirement of absentee balloting

(c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice

President, in such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

Registration: time for application;
absentee balloting: time of
application and return of ballots

(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

Change of residence; voting in person
or by absentee ballot in State of
prior residence

(e) If any citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any election for President and Vice President has begun residence in such State or political subdivision after the thirtieth day next preceding such election and, for that reason, does not satisfy the registration requirements of such State or political subdivision he shall be allowed to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election, (1) in person in the State or political subdivision in which he resided immediately prior to his removal if he had satisfied, as of the date of his change of residence, the requirements to vote in that State or political subdivision, or (2) by absentee ballot in the State or political subdivision in which he resided immediately prior to his removal if he satisfies, but for his nonresident status and the reason for his absence, the requirements for absentee voting in that State or political subdivision.

Absentee registration requirement

(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of registration that does not include a provision for absentee registration.

State or local adoption of less restrictive voting practices

(g) Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein.

Definition of "State"

(h) The term "State" as used in this section includes each of the several States and the District of Columbia.

False registration, and other fraudulent acts and conspiracies: application of penalty for false information in registering or voting

(i) The provisions of section 1973i(c) of this title shall apply to false registration, and other fraudulent acts and conspiracies, committed under this section.

ELECTIVE FRANCHISE 42 § 1973dd-1

§ 1973dd. Definitions

For the purpose of this subchapter, the term

--

(1) "Federal election" means any general, special, or primary election held solely or in part for the purpose of selecting, nominating, or electing any candidate for the office of President, Vice President, Presidential elector, Member of the United States Senate, Member of the United States House

of Representatives, Delegate from the District of Columbia, Resident Commissioner of the Commonwealth of Puerto Rico, Delegate from Guam, or Delegate from the Virgin Islands;

(2) "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands;

(3) "United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands, but does not include American Samoa, the Canal Zone, the Trust Territory of the Pacific Islands, or any other territory or possession of the United States; and

(4) "official postcard" means a postcard application for registration to vote and for an absentee ballot in the form provided in section 1973cc-14(d) of this title.

Pub.L. 94-203, § 2, Jan. 2, 1976, 89 Stat. 1142; Pub.L. 95-593, §1, Nov. 4, 1978, 92 Stat. 2535.

§ 1973dd-1. Qualifications for registration and vote by absentee ballot

Each citizen residing outside the United States shall have the right to register absentee for, and to vote by, an absentee ballot in any Federal election in the State, or any election district of such State, in which he was last domiciled immediately prior to his departure from the United States and in which he could have met all qualifications (except any qualification relating to minimum voting age) to vote in Federal elections under any present law, even though while residing outside the United States he does not have a place of abode or other address in such State or district, and his intent to return to such State or district may be uncertain, if--

(1) he has complied with all applicable State or district qualifications and requirements, which are consistent with this subchapter, concerning absentee registration for, and voting by, absentee ballots;

(2) he does not maintain a domicile, is not registered to

vote, and is not voting in any other State or election district of a State or territory or in any territory or possession of the United States; and

(3) he has a valid passport or card of identity and registration issued under the authority of the Secretary of State or, in lieu thereof, an alternative form of identification consistent with this subchapter and applicable State or district requirements, if a citizen does not possess a valid passport or card of identity and registration.

Pub.L. 94-203, § 3, Jan. 2, 1976, 89 Stat. 1142; Pub.L. 95-593, § 2, Nov. 4, 1978, 92 Stat. 2535.

§ 1973dd-2. State provisions

Absentee registration or qualification

(a) Each State shall provide by law for the absentee registration or other means of absentee qualification of all citizens residing outside the United States and

entitled to vote in a Federal election in such State pursuant to section 1973dd-1 of this title whose application to vote in such election is received by the appropriate election official of such State not later than thirty days immediately prior to any such election.

§ 1973dd-5. Applicability to State registration requirements and voting practices; determination of residence or domicile for tax purposes

(a) Nothing in this subchapter shall--

(1) be deemed to require registration in any State or election district in which registration is not required as a precondition to voting in any Federal election; or

(2) prevent any State or election district from adopting or following any voting practice which is less restrictive than the practices prescribed by this subchapter.

(b) The exercise of any right to register or vote in Federal elections by any citizen outside the United States shall not affect the determination of his place of residence or domicile for purposes of any tax imposed under Federal, State, or local law.

Pub.L. 94-203, § 9, formerly § 7, Jan. 2, 1976, 89 Stat. 1144, renumbered and amended Pub.L. 95-593, §§ 4(1), 5, Nov. 4, 1978, 92 Stat. 2535, 2537.

STATEMENT OF THE CASE

Petitioners are four individuals who are United States citizens residing in the Territory of Guam and registered to vote in the territorial elections. Two of the individual petitioners were born and raised in the Territory of Guam. One individual petitioner is a naturalized citizen of the United States. One individual petitioner was formerly a resident of the State of California and registered to vote in the State of California. By relocating to the Territory of Guam, the former resident of California became disenfranchised with regard to voting for President and Vice President of the United States. The other individual petitioners have never been able to cast ballots in a Presidential election by virtue of their lifelong residency in the Territory of Guam.

Guam is an unincorporated territory of the United States of America. Guam is directly under the governing authority of the Congress of the United States pursuant to Article 4, section 3 of the Constitution of the United States. The Organic Act of Guam, enacted by Congress, specifically incorporates the privileges and immunities clause of the United States Constitution, and the equal protection clause of the fourteenth amendment of the United States Constitution.

On November 17, 1982 the Attorney General of the Territory of Guam, on behalf of all United States citizens residing on Guam registered to vote in the territorial elections, and the four individual petitioners, filed a complaint for declaratory judgment pursuant to 28 U.S.C.A. § 2201. The complaint alleged that petitioners have not been afforded the protection of the privileges and immunities clause of the Constitution and the fifth amendment to the

Constitution. The District Court of Guam had subject matter jurisdiction of this case pursuant to 48 U.S.C. section 1424(a) and 28 U.S.C.A. section 1331, as this case arises under the Constitution and laws of the United States.

REASONS FOR ALLOWANCE OF THE WRIT

One of the individual petitioners was formerly a resident and voter in the State of California. By relocating to the Territory of Guam and registering to vote in the Territory of Guam, this United States citizen has become disenfranchised with regard to voting for President of the United States. There are other United States citizens, now residents of the Territory of Guam who have suffered the identical consequence upon relocating to the Territory of Guam. The United States citizens residing in the Territory of Guam, who formerly voted in a state of the Union, have been denied the same

equal protection of the law and privileges and immunities extended to United States citizens residing in foreign nations by the Congress of the United States.

In 1975 Congress enacted the Overseas Citizens Voting Rights Act. 42 U.S.C.A. § 1973dd-1. The purpose of the Overseas Citizens Voting Rights Act was to provide United States citizens residing in foreign nations the means to vote in federal elections in the United States. In 1978 Congress enacted an amendment to the Act, 42 U.S.C.A. § 1973dd-5, exempting those citizens who vote in states pursuant to the Act from the imposition of state and federal taxes.

In the legislative history of the Overseas Citizens Voting Rights Act, the congressional committee stated that the right to vote for national officers is an inherent right and privilege of national citizenship and that Congress retains the power to protect that right. H.R. Rep. No. 649, 94th

Cong., 1st Sess.5, reprinted in [1975] U.S. Code Cong. & Ad. News 2358, 2362. It was the view of the committee that, in order to ensure the right of a United States citizen to vote for national officers, a state would be required to accept the ballot of such a citizen even though the citizen was no longer a resident of the state, for the purpose of voting in a federal election. Id. at 7 reprinted in [1975] U.S. Code Cong. & Ad. News at 2364. United States citizens residing in the Territory of Guam and registered to vote in the territorial elections, who formerly voted in the several states of the Union, have not been afforded the same equal protection of the law to vote for President as United States citizens living in a foreign nation.

The individual petitioner who formerly voted in the State of California became disenfranchised by relocating to a territory of the United States. Yet, the Congress has

identified the right to vote for national officers as an inherent right and privilege of national citizenship. The enactment of the Overseas Citizens Voting Rights Act and its amendment provides United States citizens residing in foreign nations with the opportunity to exercise their right to vote in the Presidential election. It is incomprehensible that a United States citizen residing in a United States territory is denied the opportunity to exercise the same right to vote.

In the opinion below of the U.S. Court of Appeals for the Ninth Circuit, the Court states that "the right to vote in Presidential elections under Article 2 inheres not in citizens but in states: Citizens vote indirectly for the President by voting for state electors. Since Guam concededly is not a state, it can have no electors, and petitioners cannot exercise individual votes in a Presidential election. There is no

constitutional violation." If the right to vote in Presidential elections inheres not in citizens but in states, then it would appear that Congress would not have the authority to enact legislation regarding voter qualifications of the states.

In 1970 the United States Congress enacted legislation which established a uniform legislative scheme for absentee registration and balloting for Presidential elections throughout the several states of the Union. This was the Voting Rights Act of 1970, 42 U.S.C.A. § 1973aa-1. In the statute, Congress has found there is an inherent constitutional right of citizens to vote for the President and Vice President. The authority of the Congress to enact this legislation, which supersedes the authority of the several states to qualify their electors for the Presidential election, was upheld in Oregon v. Mitchell, 400 U.S. 112 (1970). In this decision, the Court discussed at length

the voting rights guaranteed to citizens by the Constitution and congressional power to regulate federal elections vis a vis the power of the states to regulate federal elections.

The U.S. Court of Appeals for the Ninth Circuit states in its opinion below that the rationale of Oregon v. Mitchell and the passage of the Overseas Citizens Voting Rights Act do not show that Congress has authorized all American citizens to vote in Presidential elections. The Ninth Circuit is ignoring the intent of Congress in the passage of the Overseas Citizens Voting Rights Act as shown by its legislative history. The congressional committee which considered the proposed Act identified voting for national officers as an inherent right and privilege of national citizenship. Passage of the Overseas Citizens Voting Rights Act by the Congress was a means to ensure United States citizens the inherent

right and privilege of national citizenship to vote for national officers. If the right to vote for President is not a right of national citizenship, the Congress did not have the authority to enact the Overseas Citizens Voting Rights Act requiring the several states to accept ballots of nonresident voters in federal elections. The Ninth Circuit Court of Appeals has held that the right to vote for President and Vice President is not a right of national citizenship but depends solely on residence within a state of the Union. The United States Congress has enacted legislation which recognizes that voting for President and Vice President is an inherent constitutional right of all United States citizens. This Court, in upholding the authority of Congress to enact the registration and absentee ballot provisions of the Voting Rights Act of 1970, acknowledged that voting for President and Vice President is a right of national

citizenship. (Oregon v. Mitchell, supra.) Moreover, the Congress enacted the Overseas Citizens Voting Rights Act to provide United States citizens residing in foreign nations with the electoral process by which they could exercise their right to vote for President and Vice President.

Clearly, the Congress and the United States Supreme Court have determined that voting for President and Vice President is an inherent constitutional right and privilege of national citizenship. United States citizens residing in a territory of the United States therefore are entitled to a declaration of their right to vote for President and Vice President of the United States. Petitioners are not asking the Court to determine that the Territory of Guam is entitled to electoral votes in the electoral college. Petitioners are seeking vindication of their right to vote for President and Vice President of the United States. By virtue of

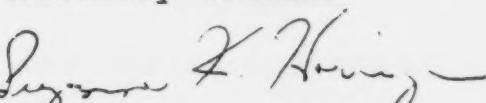
their residency in a territory of the United States, are United States citizens residing in Guam relegated to second class national citizenship?

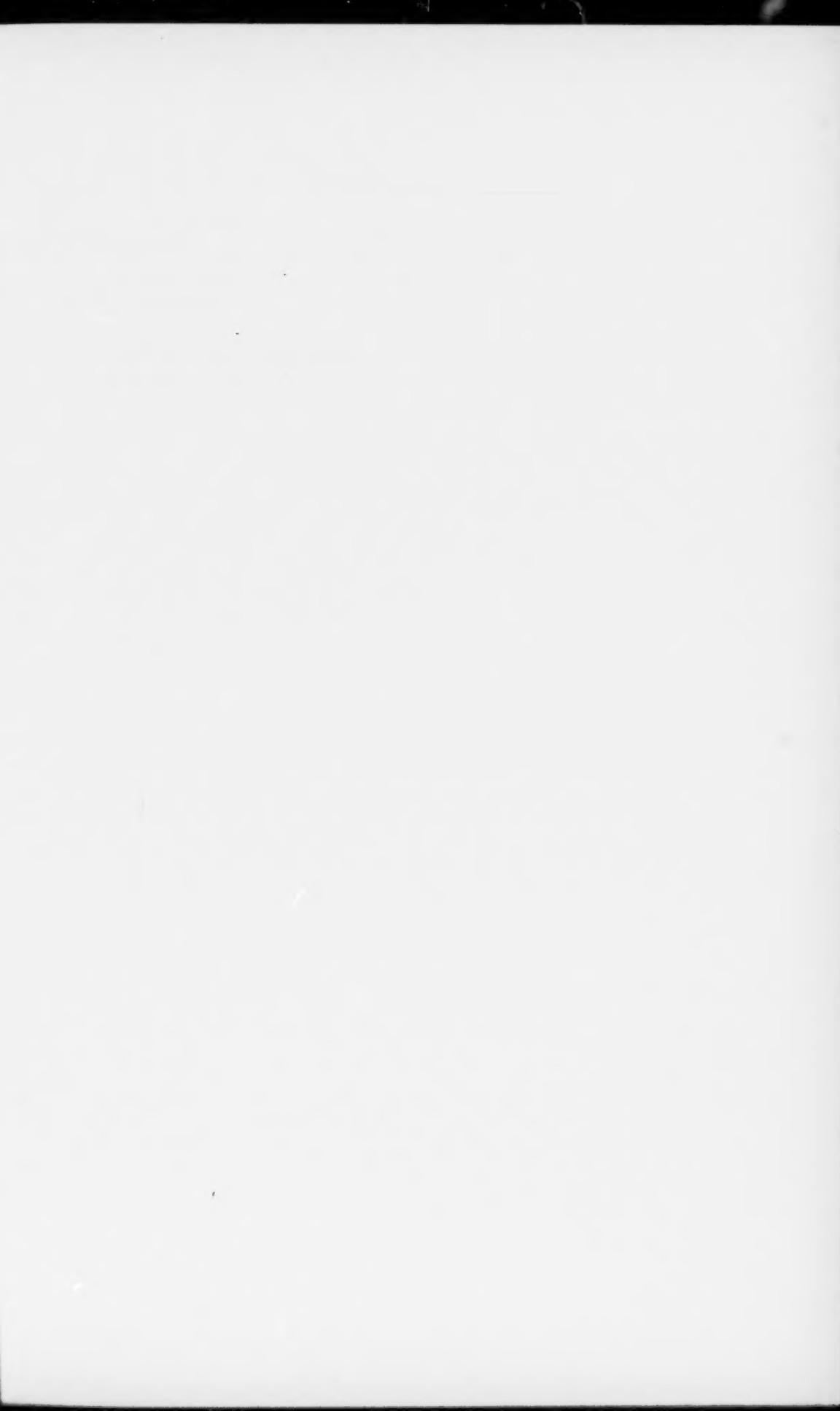
CONCLUSION

For the reasons stated above, petitioners urge this Court to grant the writ of certiorari requested.

Respectfully submitted this 22nd day of October, 1984.

RICHARD G. OPPER
Attorney General

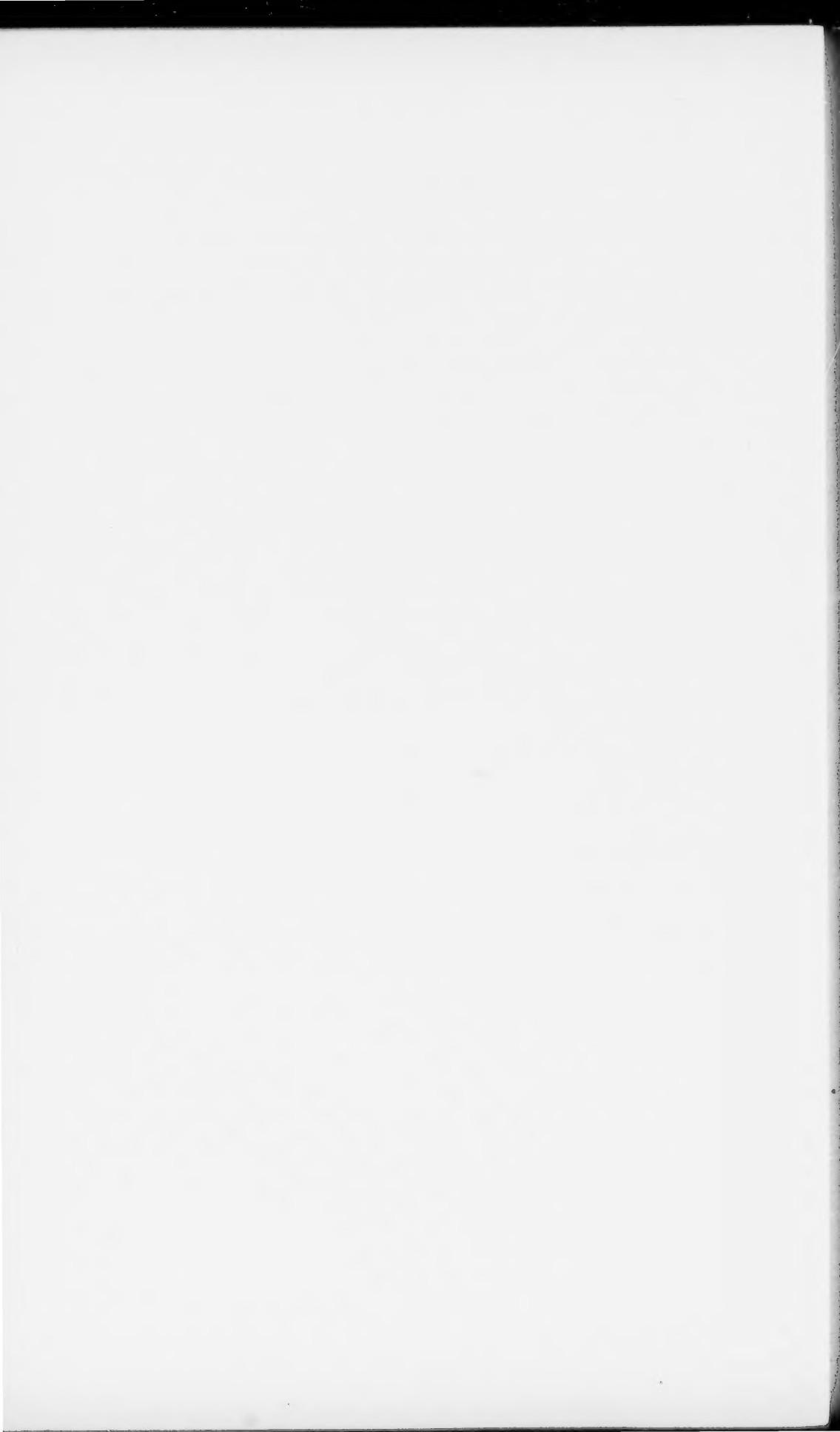
by: 
Suzanne K. HORRIGAN
Assistant Attorney General





APPENDIX

- A. Order of Dismissal, entered March 16, 1983 in the District Court of Guam, Territory of Guam, Civil Case No. 82-0228
- B. Opinion, entered July 24, 1984 in the United States Court of Appeals for the Ninth Circuit, Case No. 83-1890



APPENDIX A

CIVIL CASE NO. 82-0228

IN THE DISTRICT COURT OF GUAM
TERRITORY OF GUAM

THE ATTORNEY GENERAL OF THE TERRITORY
OF GUAM ON BEHALF OF ALL UNITED
STATES CITIZENS RESIDING
ON GUAM QUALIFIED TO VOTE
PURSUANT TO THE ORGANIC ACT, et al.,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

ORDER OF DISMISSAL

Entered March 16, 1983

The Attorney General of the Territory of Guam on behalf of the other citizens of Guam and four individuals who are citizens of the United States of America residing on Guam and qualified to vote for members of the Guam Legislature, the Governor of Guam and the Delegate from Guam to the United States Congress instituted this suit pursuant to 28

USC §2201 seeking a declaratory judgment of the right of United States citizens residing on Guam to vote for President and Vice President of the United States.

On January 14, 1983, the Defendant, the United States of America, filed a Motion to Dismiss the above-entitled case on the grounds that the Plaintiffs lack standing and that their complaint fails to state a claim upon which relief can be granted.

The court will first address the issue of the Plaintiffs' standing. As to the Attorney General of the Territory of Guam filing this suit as parens patriae of the United States citizens on Guam, the U.S. Supreme Court has held that a state has no "standing as the parens partriae of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate parens patriae of every American citizen, "South Carolina v. Katzenbach, 383 U.S. 301, 324, 86 S.Ct. 803, 15 L.Ed.2d 769

(1966). The Supreme Court, also stated in Alfred L. Snapp & Son, Inc. v. Puerto Rico, ____ U.S. ____, 102 S.Ct. 3260, 3270, n. 16 (1982) that "a State does not have standing as parens patriae to bring an action against the federal government."

We hold that the same reasoning as was applied to the states also applies to the Territory of Guam.

Furthermore, the Attorney General of Guam cannot represent the four named individual plaintiffs on a private basis since §7001 of the Government Code of Guam specifically prohibits such practice. Ms. Horrigan who prepared and submitted the Plaintiffs' brief and orally argued this case before the court is only temporarily admitted to practice before the courts in Guam pursuant to §28019.1(b) of the Government Code of Guam. Section 28019.1(b) permits attorneys who are admitted to practice in any state of the United States to practice law in

the Territory of Guam as an attorney for the Government of Guam without taking the Guam Bar Examination, but only while representing the Government of Guam. Thus, Attorney Horrigan cannot privately represent the named individuals before this court since she is only provisionally admitted to practice before this court. Even if she were duly admitted to the Bar of Guam, she still cannot represent any person, while in the employment of the Government of Guam because of the prohibition under Section 7001.

The next issue to be addressed by this court is whether the complaint fails to state a claim upon which relief can be granted. Even though this court is of the opinion that the Plaintiffs do not have standing, this court nonetheless wishes to address and dispose of this case on the merits.

In a very lengthy memorandum, Plaintiffs assert the basic premise that the right to vote is a fundamental right guaranteed by the

Constitution of the United States.

The protection of this fundamental right to vote has afforded the United States Congress the basis to enact federal regulation regarding State elections.

Plaintiffs then cited numerous cases where Congress did assert its authority to enact legislation regulating the States under Article I, Section 4 of the United States Constitution, as well as cases where the United States Supreme Court found state legislations on voting rights violative of the 13th and 14th Amendments, under the Privileges and Immunities Clause and the Equal Protection Clause.

These clauses prohibit the states from enacting qualifications and requirements that abrogate the right of a citizen to participate in a local, state or federal elective process Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), and Reynold v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d

506 (1964).

Plaintiffs' reliance on the asserted Constitutional provisions and the cases cited in support thereof is utterly misplaced in a suit, such as this, where the United States is the party Defendant in the alleged controversy.

The next facet of Plaintiffs' argument focuses on the inherent right of United States citizens to vote in Presidential and Vice Presidential elections. The Plaintiffs argue that Congress has recognized this inherent right by the enactment of the 1970 Federal Statute which dealt with abolishing durational residency requirements and establishing uniform standards relative to absentee registration and absentee balloting in Presidential elections. 42 USC §1973aa-1. It is important to note, however, that 42 USC §1973aa-1 consistently refers to citizens of the United States who are otherwise qualified to vote in any state or its political

subdivision, in any election for President and Vice President. The term "State" as used in this statute is defined in §1973aa-1(h) as including each of the several States and the District of Columbia. Thus, this statute does not include the Territory of Guam.

The Plaintiffs then quote extensively from Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 160, 17 L.Ed.2d 272 (1970), concerning the power of Congress to regulate elections with the regard to the power of the States to regulate elections. The Plaintiffs maintain that the Constitution of the United States guarantees a United States citizen a fundamental right to vote without regard to the geographic location of the citizen and that Congress has the power to enact legislation which insures citizens equal protection of these rights by the law from interference by the State or any of its political subdivisions in order to protect those fundamental rights.

The Plaintiffs further argue that the United States citizens residing on Guam also have an inherent right to vote for President and Vice President of the United States since the Organic Act of Guam incorporates the Privileges and Immunities Clause and the Equal Protection Clause of the Untied States Constitution. The Plaintiffs maintain that since Congress has the authority to regulate federal elections, it has the power to enact legislation which insures the United States citizens residing on Guam equal protection of their fundamental right to vote in the Presidential and Vice Presidential elections. The Plaintiffs cite as support for their proposition the Congressional enactment of the Voting Rights of Overseas Citizens Act, 42 USC §1973dd and §1973dd-1, which insures United States citizens living outside the United States the right to register absentee for, and to vote by an absentee ballot in any Federal election in the state of his last

domicile prior to departure from the United States. Federal election is defined by Section 1973dd to include the election of the Guam Delegate to Congress, and Guam is included in the definition of "State".

Lastly Plaintiffs argued that Section 1973dd-5, Title 42 USC discriminates upon citizens of one state residing in another state. A citizen of New York who moves to California may cast his vote in any federal election in New York through absentee voting provided he retains his New York citizenship. In doing so, he will still be subjected to any tax imposed by the State of New York. According to Plaintiffs under 1973dd-5, a New York citizen may reside in any place outside the United State, retain his right to cast his vote in any federal election in New York, yet not be subjected to tax imposed by New York.

While this court is in agreement with the Plaintiffs that the United States

citizens residing on Guam should be afforded the privilege to vote for the President and Vice President of the United States, this court cannot sidestep the United States Constitution. It is true that Congress does have authority to regulate federal elections; however, their authority is limited by the restrictions imposed by the United States Constitution. The language of Art. II, Sec. 1, Cl.2, of the United States Constitution which controls the election of the President and Vice President of the United States is clear--it limits participation in the Presidential and Vice Presidential elections to the States. Art. II, Sec. 1, Cl.2, of the United States Constitution provides in pertinent part:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. . ."

Guam as stated before is not a state, it is an unincorporated territory and as such is not constitutionally qualified to participate in the election of the President and Vice President, and therefore United States citizens living in Guam who are not residents of a state are precluded from voting in President and Vice President of the United States.

The United States citizens residing in the District of Columbia had the same problems as that of United States citizens residing on Guam. To remedy the problem of the United States citizens residing in the District of Columbia, the Congress felt it was necessary to enact the 23rd Amendment to the Constitution.¹ The legislative history of the 23rd Amendment states the following:

"The purpose of this proposed constitutional amendment is to provide and citizens of the District of Columbia with appropriate rights of voting in national elections for President and Vice

President of the United States. It would permit District citizens to elect Presidential electors who would be in addition to the electors from the States and who would participate in electing the President and Vice President.

The District of Columbia, with more than 800,000 people, has a greater number of persons than the population of each of 13 of our States. District citizens have all the obligations of citizenship, including the payment of Federal taxes, of local taxes, and service in our Armed Forces. They have fought and died in every U.S. war since the District was founded. Yet, they cannot now vote in national elections because the Constitution has restricted that privilege to citizens who reside in States. The resultant constitutional anomaly of imposing all the obligations of citizenship without the most fundamental of its privileges, will be removed by this proposed constitutional amendment.

• • •

Simply stated, voting rights are denied District citizens because the Constitution provides machinery only through the States for the selection of the President and Vice President (art. II, sec. 1). In fact, all national elections including those for Senators and Representatives are stated in terms of the States. Since the District is not a State or a part of a State, there is no machinery through which its citizens may

participate in such matters. It should be noted that, apart from the Thirteen Original States, the only areas which have achieved national voting rights have done so by becoming States as a result of the exercise by the Congress of its powers to create new States pursuant to article IV, section 3, clause 1, of the Constitution.

• • •

The proposed amendment would change the Constitution only to the minimum extent necessary to give the District appropriate participation in national elections. It would not make the District of Columbia a State. It would not give the District of Columbia any other attributes of a State or change the constitutional powers of the Congress to legislate with respect to the District of Columbia and to prescribe its forms of government. It would not authorize the District to have representation in the Senate or the House of Representatives. It would not alter the total number of presidential electors from the States, the total number of Representatives in the House of Representatives, or the apportionment of electors or Representatives among the States."

Thus, as the Defendant correctly points out, until the territory of Guam becomes a state or a constitutional amendment is approved which extends the right to vote for

President and Vice President of the United States to Guam, the United States citizens of Guam, non-residents of any state, do not have a right to vote for the President and Vice President of the United States.

This same issue was addressed in Sanchez v. United States, 376 F.Supp. 239 (D.P.R., 1974). The Plaintiff in Sanchez, Id., was a United States citizen and resident of the Commonwealth of Puerto Rico who alleged that she was entitled to vote under the Constitution for the President and Vice President of the United States. The District Court of Puerto Rico determined that "... until the Commonwealth votes for Statehood, or until a constitutional amendment is approved which extends the presidential and vice presidential vote to Puerto Rico, there is no substantial constitutional question raised by plaintiff which would justify the convening of a three-judge court..." and thus, the District Court of Puerto Rico dismissed the

Plaintiff's complaint.

Based on the foregoing, the Defendant's
motion to dismiss is granted.

SO ORDERED.

Dated this 16th day of March, 1983.

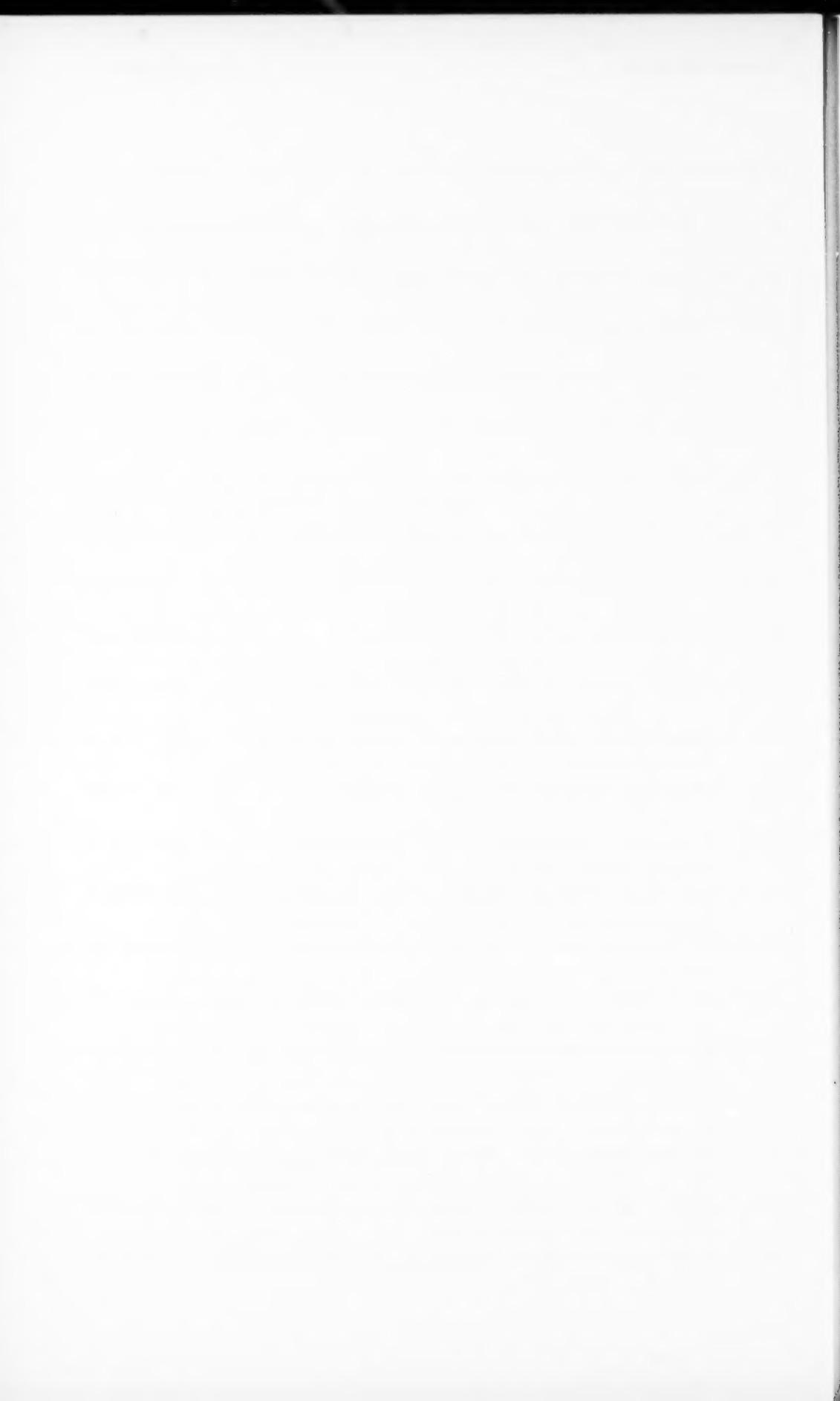
CRISTOBAL C. DUENAS
JUDGE, DISTRICT COURT OF
GUAM

FOOTNOTE

"AMENDMENT 23

The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of a President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment [Const., Amend. 12]."



APPENDIX B

NO. 83-1890

IN THE UNITED STATES COURT OF
APPEALS FOR THE NINTH
CIRCUIT

THE ATTORNEY GENERAL OF THE TERRITORY
OF GUAM ON BEHALF OF ALL U.S.
CITIZENS RESIDING IN GUAM
QUALIFIED TO VOTE PURSUANT
TO THE ORGANIC ACT, et al.
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

OPINION

Entered July 24, 1984

Appeal from the United States
District Court for the Territory
of Guam
Cristobal C. Duenas, District Judge,
Presiding
Argued and submitted February 16, 1984

Before: ANDERSON, SCHROEDER, and ALARCON,
Circuit Judges.

SCHROEDER, Circuit Judge.

The plaintiffs in this case, the

Attorney General of Guam and four individuals, sued the United States on behalf of American citizens who are residents of Guam and who are registered to vote in territorial elections. Plaintiffs sought a judgment declaring the right of these citizens to vote in the United States Presidential and Vice Presidential elections. The district court dismissed. We affirm because the complaint failed to state a claim for which relief could be granted.^{1/}

Guam is an unincorporated territory of the United States, under the plenary control of Congress pursuant to Article IV, section 3 of the Constitution. In 1950, Congress passed the Organic Act of the Territory of Guam, 64 Stat. 384 (codified as amended at 48 U.S.C. §§ 1421-1424 (1976 & Supp. V 1981)), which declared Guam a territory and established its government. The Organic Act incorporated specifically, as part of a bill of rights, the privileges and immunities

clause of the Constitution, 48 U.S.C. § 1421b(u), and the equal protection clause of the fourteenth amendment, 48 U.S.C. § 1421b(h). At the same time Congress provided that Guamanians were American citizens. See 8 U.S.C. § 1407 (1982). See generally H.R. Rep. No. 1365, 82d Cong., 2d Sess., reprinted in 1852 U.S. Code Cong. & Ad. News 1653, 1734; P. Carano & P. Sanchez, A complete History of Guam 365-98 (1964).

American citizens who are residents of Guam do not vote in the election of the President or Vice President of the United States, and plaintiffs contend that the ability to do so is a privilege or immunity of citizenship. The Constitution does not grant to American citizens the right to elect the President, however. Article II, section 1, clause 2 of the United States Constitution provides:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the

whole Number of Senators and Representatives to which the States may be entitled in the Congress

Electors appointed by the states elect the President and Vice President. U.S. Const., Article II, section 1, clause 3. See also Anderson v. Celebrezze, 103 S. Ct. 1564, 1573 n.18 (1983) ("The Constitution expressly delegates authority to the States to regulate selection of Presidential electors").

Thus, citizens do not vote for the President. Electors, appointed by "each State," vote for the President. Although the merits and shortcomings of the electoral college system have been debated over the years, see, e.g., Feerick, The Electoral College -- Why It Ought to Be Abolished, 37 Fordham L. Rev. 1 (1968); Rosenthal, The Constitution, Congress, and Presidential Elections, 67 Mich. L. Rev. 1 (1968), it has not been replaced by direct election. The right to vote in presidential elections under Article II inheres not in citizens but in

states: citizens vote indirectly for the President by voting for state electors. Since Guam concededly is not a state, it can have no electors, and plaintiffs cannot exercise individual votes in a presidential election. There is no constitutional violation.

A constitutional amendment would be required to permit plaintiffs to vote in a presidential election. The District of Columbia experience illustrates this point, for American citizens on Guam are not the first American citizens not residing in states to complain about their inability to vote in presidential elections. Until the passage of the twenty-third amendment to the Constitution, American citizens who lived in the District of Columbia could not participate in presidential elections. The District of Columbia is not a state, but rather is under the exclusive control of Congress pursuant to Article I, section 8, clause 17

of the Constitution.

The twenty-third amendment to the Constitution solved the problem of those citizens by ordering that the District would appoint electors who would "be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State . . ." U.S. Const. amend XXIII, § 1. The House Committee on the Judiciary, reporting on the proposed amendment, recognized the obvious barrier of Article II, section 1, when it noted that absent an amendment, "voting rights are denied District citizens because the Constitution provides machinery only through the States for the selection of the President and Vice President. (Art. II, sec 1)." H.R. Rep. No. 1698, 86th Cong. 2d Sess., reprinted in 1960 U.S. Code Cong. & Ad. News 2. The report also observed that "apart from the Thirteen Original States, the only areas which have achieved national voting rights have done so

by becoming States as a result of the exercise by the Congress of its powers to create new States pursuant to Article IV, section 3, clause 1 of the Constitution." Id. See also Sanchez v. United States, 376 F.Supp. 239, 242 (D Puerto Rico 1974) (suit by American citizens residing in Puerto Rico to vote in presidential elections did not present a substantial constitutional question that would justify convening a three-judge court).

The plaintiffs argue that a constitutional amendment is not necessary because, since the passage of the twenty-third amendment, the Supreme Court has so expansively interpreted Congressional power over federal elections that Congress already has legislated presidential voting rights for American citizens who are not residents of any state. Specifically, plaintiffs point to the decision in Oregon v. Michell, 400 U.S. 112 (1970), and the Overseas Citizens Voting Rights Act (OCVRA), 42 U.S.C. § 1973dd (1976

& Supp. V 1981), which relied upon Mitchell for its constitutional basis. Neither Oregon v. Mitchell nor the OCVRA, however, show that Congress has authorized all American citizens, even though not residents of a state, to vote in the presidential election. Both are premised upon the rights of citizens of states.

Oregon v. Mitchell upheld Congressional voting rights legislation which struck down state "durational residency" provisions and substituted nationwide uniform state residency requirements for voting for presidential and vice-presidential electors. Voting Rights Amendments of 1970, Pub. L. No. 89-110, Title II, § 202, as added Pub. L. No. 91-285, § 6, 84 Stat. 316 (codified at 42 U.S.C. § 1973aa-1 (1976)). All of the five opinions in the case assume residency in a state. See 400 U.S. at 124 (J. Black); 400 U.S. at 147-50 (J. Douglas); 400 U.S. at 213-16 (J. Harlan); 400 U.S. at 237-40 (J.

Brennan); 400 U.S. at 285-92 (J. Stewart). This assumption is consistent with the Voting Rights Amendments section on residency requirements, which provides for a nationally uniform system of registration for "all duly qualified residents of [a] State." 42 U.S.C. § 1973aa-1(d).

The OCVRA preempted state residency voting requirements for disenfranchised American citizens who had been residents of states but, retaining their American citizenship, moved to foreign countries. Under the Act, citizens who live outside this country may vote by absentee ballot in their last state of residency, whether or not they pay taxes in that state and whether or not they have a definite plan to return to that state.

The legislative history of the OCVRA makes clear that it was premised constitutionally on prior residence in a state. With regard to the constitutionality of the Act, a House Report stated:

The Committee believes that a U.S. citizen residing outside the United States can remain a citizen of his last State of residence and domicile for purposes of voting in Federal elections under this bill, as long as he has not become a citizen of another State and has not otherwise relinquished his citizenship in such prior State.

H.R. Rep. No. 649, 94th Cong., 1st Sess. 7, reprinted in 1975 U.S. Code Cong. & Ad. News 2358, 2364. Calling the proposed legislation a "reasonable extension of the bona fide residence concept" based on Mitchell, id. at 6, reprinted in 1975 U.S. Code Cong. & Ad. News at 2363, the House Report stated that the purpose of the bill was to "assure the right of otherwise qualified private U.S. citizens residing outside the United States to vote in federal elections." Id. at 1, reprinted in 1975 U.S. Code Cong. & Ad. News at 2358.

Plaintiffs' claim in this case is asserted on behalf of all voters who vote in Guam elections. It is not a claim on behalf

of those who have previously qualified to vote in a state election. The OCVRA does not evidence Congress's ability or intent to permit all voters in Guam elections to vote in presidential elections. The OCVRA rationale simply is inapplicable to the problem plaintiffs raise, and the judiciary is not the institution of our government that can provide the relief they seek.

Affirmed.

FOOTNOTE

1/ There were additional grounds for the district court's dismissal. It held that the Territory of Guam does not have standing to bring this lawsuit as parens patriae against the United States. See South Carolina v. Katzenbach, 353 U.S. 301, 324 (1966). It further held that the Assistant Attorney General who was representing Guam was only provisionally admitted to practice before the district court and could not represent the individual plaintiffs, whose standing was not challenged. On appeal the government has not taken issue with appellants' counsel's qualification, and we therefore must address the merits of the individual plaintiffs' claims.

(8)
No. 84-666

Office-Supreme Court, U.S.
FILED
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~~ALEXANDER L STEVENS,~~
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

ATTORNEY GENERAL OF THE TERRITORY
OF GUAM, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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ATTORNEY GENERAL OF THE TERRITORY
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v.

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*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, citizens of Guam, contend that the Constitution gives them a right to vote in the election for President and Vice President of the United States.

1. Petitioners, four individual citizens of Guam and the Attorney General of Guam as *parens patriae* for the citizenry of Guam, brought this suit in the District Court of Guam seeking a declaratory judgment that all United States citizens residing in Guam have the right to vote for President and Vice President of the United States.¹ The district court dismissed the suit (Pet. App. A 1-15). The court first held that petitioners lacked standing (*id.* at 2-4). The court went on, however, to address the merits, concluding that the

¹Congress has provided that persons born in Guam are United States citizens. 8 U.S.C. 1407.

Constitution limits participation in elections for President and Vice President to citizens of the states, and hence citizens of Guam do not qualify (*id.* at 10-11).

The court of appeals affirmed on the merits (Pet. App. B 1-11; 738 F.2d 1017).² The court explained that the Constitution (Art. II, § 1) does not grant American citizens the right to elect the President; rather, under the Electoral College system, that right is bestowed upon state electors who are selected by the citizens of each state (Pet. App. B 3-5). The court noted that, because of this constitutional framework, it was necessary to adopt the 23rd Amendment in order to allow residents of the District of Columbia to vote in Presidential elections (see *id.* at 5-7). The court also rejected petitioners' reliance on *Oregon v. Mitchell*, 400 U.S. 112 (1970), and the Overseas Citizens Voting Rights Act of 1975 (OCVRA), 42 U.S.C. 1973dd *et seq.*, explaining that that decision and statute applied only to persons who were already citizens of a state and therefore provided no basis for inferring a right to vote for citizens of Guam (Pet. App. B 7-11).

2. Relying on statutes enacted by Congress and decisions of this Court that have "identified the right to vote for national officers as an inherent right and privilege of national citizenship" (Pet. 19), petitioners apparently contend (Pet. 19-23) that the right to vote in a Presidential election must be accorded to citizens of the United States who reside in Guam. This contention is wholly without merit for reasons well stated by the court of appeals (Pet. App. B 7-11). Nothing in *Oregon v. Mitchell*, *supra*, or the OCVRA indicates that Congress has the power to confer the right to vote for President on individuals who are not citizens of a state. Indeed, petitioners concede (Pet. 23) that

²The court of appeals did not address the standing question (Pet. App. B 11 n.1).

they "are not asking the Court to determine that the Territory of Guam is entitled to electoral votes in the electoral college." That is a wise concession, since such a change plainly is one that would have to be made by constitutional amendment, as in the case of the District of Columbia. But petitioners do not explain how their supposed constitutional right to vote for President would be exercised if Guam has no electors.³ The Constitution simply does not require that citizens of Guam be given the right to vote in Presidential elections; to the contrary, the framework of the Constitution leaves no room for them to do so.

3. Petitioners' primary contention in this Court (Pet. 17-19) is that the Equal Protection Clause requires that one of the petitioners, a former resident of California who was registered to vote there, be allowed to vote in Presidential elections as a citizen of California. This contention is based on OCVRA, which provides that former United States residents now residing outside the United States who are otherwise qualified to register to vote in the last state in which they resided are granted the right to vote by absentee ballot in federal elections in that state. 42 U.S.C. 1973dd-1. The Act does not by its terms provide similar rights for persons who move from a state to Guam.

This contention is raised for the first time in this Court (see Pet. App. B 10-11). Petitioners offer no reason for not raising this issue below. Long before their certiorari petition was filed, petitioners certainly were aware of the constitutional significance of residence in a state. The district court's decision quite clearly was premised on the fact that the Constitution provides for participation in Presidential elections only by residents of a state (see Pet. App. A 10-11, 14).

³In the court of appeals, petitioners suggested (Br. 23) that Guam citizens could vote for electors in Hawaii. That suggestion has apparently been abandoned here.

Yet petitioners did not raise this issue on appeal, nor did they seek rehearing in the court of appeals when the district court's decision was affirmed on this ground. In these circumstances, this Court should not now consider petitioners' contention. See *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

In any event, petitioners' equal protection claim is without merit because there is a rational basis for distinguishing between citizens of a state who move to another country and those who move to Guam. Those who move to another country have no right to vote in any federal election in their new place of residence. By contrast, residents of Guam vote for the Delegate from Guam to the United States House of Representatives; OCVRA specifically defines the election of that official as a "Federal election." 42 U.S.C. 1973dd(1). It is reasonable for Congress to avoid creating a system in which a person can vote in federal elections in two different jurisdictions.⁴

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1985

⁴Indeed, application of OCVRA to persons who move to Guam and vote there would create the anomaly that those persons would be allowed to vote for two members of the House of Representatives: one from their former state and the Delegate from Guam. Surely, Congress does not violate the Constitution by preventing this from occurring.

